(16)

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8,[1] Petitioners Jacob Winkelman, by and through his parents, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman submit this supplemental brief in support of their February 2, 2006, petition for a writ of certiorari to review the interlocutory order of the United States Court of Appeals for the Sixth Circuit.

Since we filed the petition in this already important Individuals with Disabilities in Education Act (IDEA) case on February 2, 2006, the stakes have become significantly higher for the Winkelmans and for other non-lawyer parents of disabled children who plan to litigate – or have already litigated – an IDEA case *pro se* in federal court. As we show in greater detail below, relying on the decision below and on *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (CA6 2005) – the prior opinion on which the Sixth Circuit based the decision below – the Cleveland Bar Association (1) has confirmed in documents filed publicly with the Ohio Supreme Court that it is presently investigating the Winkelmans' *pro se* litigation of the underlying appeal and may file an unauthorized practice of law (UPL) complaint against them, and (2) has already filed a UPL complaint against another set of non-lawyer parents because they litigated their disabled child's IDEA cases *pro se* in the United States District Court for the Northern District of Ohio.

Ohio Government Bar Rule VII allows local bar associations to establish unauthorized practice of law committees. *See* Ohio Gov't Bar R. VII § 4(A). The Cleveland Bar Association has established such a committee. Once

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[1] Rule 15.8 expressly allows "[a]ny party [to] file a supplemental brief at any time while a petition for certiorari is pending, calling attention to * * * other intervening matter not available at the time of the party's last filing."

established, such a committee "shall investigate any matter * * * that comes to its attention and may file a complaint" with the Ohio Supreme Court Board of Commissioners on the Unauthorized Practice of Law, *id.* § 4(B), if it "believes probable cause exists to warrant a hearing on the complaint," *id.* § 5. "If the Board determines, by a preponderance of the evidence, that the respondent has engaged in the unauthorized practice of law, the Board shall file * * * its report with the Clerk of the [Ohio] Supreme Court ." *Id.* § 7(G). "The Board may recommend and the Court may impose civil penalties in an amount up to ten thousand dollars per offense." *Id.* § 8(B). "After a hearing on objections [to the Board's report], the [Ohio] Supreme Court shall enter an order as it finds proper." *Id.* § 19(D)(1). The Court may order "the respondent to reimburse the costs and expenses incurred by the Board and the [prosecuting local bar association,]" and, as noted earlier, may impose a civil penalty of up to ten thousand dollars per offense. *Id.* § 19(D)(1)(b) & (c).

Relevant to this case, the Cleveland Bar Association initiated an investigation into whether the Winkelmans engaged in UPL "because they chose to represent their child before the [Sixth Circuit] without being licensed attorneys." App., *infra*, 4a.[2] Although the Cleveland Bar Association has not yet filed a UPL complaint against the Winkelmans, it has filed one against another set of non-lawyer parents – Mr. and Mrs.

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[2] The documents contained in the appendix to this supplemental brief were filed publicly with the Ohio Supreme Court, the Ohio Supreme Court's Board of Commissioners on the Unauthorized Practice of Law, or the United States District Court for the Northern District of Ohio. As documents filed with either another Court or administrative body, this Court may properly take judicial notice of them and their contents. *See, e.g., Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (CA6 1997) (court may take judicial notice of public records); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (CA5 1996) (court may take judicial notice of agency documents); *see also generally* Charles Alan Wright & Kenneth W. Graham, Jr., 21B Fed. Prac. & Proc. Evid. 2d § 5106.4 (2005).

Brian J. Woods (the "Woodses") – who, like the Winkelmans, merely litigated their autistic son's IDEA cases *pro se* in federal court. *See id.* at 1a-3a (asserting that the Woodses engaged in the unauthorized practice of law when they litigated four IDEA cases *pro se* in the Northern District of Ohio on their disabled child's behalf).[3] The complaint against the Woodses seeks both a $10,000 fine and reimbursement of the prosecuting local bar association's costs and expenses. *See id.* at 3a.

Remarkably, the Cleveland Bar Association is prosecuting the Woodses for UPL even though their *pro se* federal court appearances predated by over three years the Sixth Circuit's *Cavanaugh* decision barring such appearances.[4] In light of the Cleveland Bar Association's willingness to apply *Cavanaugh* retroactively, it appears that it is only a matter of time before the Cleveland Bar Association files a UPL complaint against the Winkelmans, who filed the underlying appeal over a month before *Cavanaugh* was decided. Because every State has a UPL statute, the Cleveland Bar Association's actions also reveal that no parents who plan to litigate – or already have litigated – an IDEA case *pro se* in federal court on behalf of their disabled children are entirely safe from UPL prosecution, except those residing in the First Circuit and insulated by its decision in *Maroni v. Pemi-Barker Reg'l Sch. Dist.*, 346 F.3d 247 (CA1 2003), permitting parental *pro se* representation.

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[3] In other documents filed by the Cleveland Bar Association, it makes clear that it is basing its UPL prosecution on the order underlying the petition in this case and on *Cavanaugh*. *See* App., *infra*, 9a.

[4] The Woodses filed the last of the four Northern District of Ohio cases on which the UPL charge is based on July 18, 2002 – over three years before the Sixth Circuit issued its August 19, 2005, decision in *Cavanaugh*. Because this information is presented in public dockets "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of it.

We have already shown in the petition that six courts of appeals are intractably divided over the question presented. *See* Pet. 11-13. We have already shown that the question presented recurs with frequency.[5] *See id.* at 13-14. And, while we have already shown that the question presented is sufficiently important to warrant this Court's immediate review, *see id.* at 14-17, the Cleveland Bar Association's decision to prosecute the Woodses for UPL and the impending prosecution of the Winkelmans for UPL exacerbates the need for this Court's prompt intervention.

As the petition explains, lawyers willing to represent families of disabled children are scarce. *See id.* at 14. Even if a lawyer is willing to represent the family of a disabled child, most families are insufficiently "rich" to afford a lawyer, and the IDEA's attorneys' fee provision is an insufficient incentive to encourage contingency or *pro bono* representation. *Id.* at 14-15. In the Sixth Circuit below – and where parents do not have their own procedural IDEA claims,

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[5] In addition to the four post-*Cavanaugh* cases noted in the petition in which the question presented has recurred, *see* Pet. 14, we have since located three other cases. One of these three newly-discovered cases has a decision available on Westlaw: *Green v. Cape Henlopen Sch. Dist.*, No. Civ.A. 04-920 KAJ, 2005 WL 3413320, *4 (D. Del. Dec. 13, 2005). The two others do not: *Peters v. Guajome Park Academy Charter Sch.*, No. 04cv1259-BEN (POR) (S.D. Cal. filed June 22, 2004); *Courtney B. v. San Ramon Valley Unified Sch. Dist.*, No. C 04-04876 JSW (N.D. Cal. filed Nov. 16, 2004). We emphasize that our knowledge of the frequency with which this issue recurs is necessarily under-inclusive. This is because such a small fraction – well under ten percent – of district court decisions are available on Westlaw or Lexis. *See* Margo Schlanger & Denies Liberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 MO. K.C. L. REV. —, — (forthcoming 2006) (noting that "only a small percentage of cases have any library-accessible opinions at all" and that in 2004, only 8.7% of all district court "terminations" – decisions disposing of a case – were available on Westlaw). Accordingly, it is almost certain that the question presented recurs with much greater frequency than we have been able to demonstrate with specific case citations.

in the Second, Third, Seventh, and Eleventh Circuits – parents who are unable to find or afford a lawyer are precluded from litigating an IDEA case *pro se* in federal court. *See id.* at 15-16.

Absent this Court's prompt determination whether, and if so, under what circumstances, non-lawyer parents may litigate an IDEA case *pro se* in federal court, overzealous bar prosecutors in any state outside the First Circuit may follow the Cleveland Bar Association's lead and seek to punish parents for attempting to vindicate their disabled children's IDEA rights in federal court the only way that, as a practical matter, many can do so – as *pro se* litigants. This will necessarily have an undesirable chilling effect even if UPL charges are never sustained. The specter of a UPL complaint and the annoyance and lost time associated with defending against such a complaint (time better spent caring for the disabled child) – in addition to any available monetary penalty (money better spent providing for the disabled child) – will deter parents in those states – most already significantly disadvantaged, *see* Pet. 14-15 – from attempting to vindicate their disabled children's IDEA rights.

In addition to the reasons already stated in the petition, this Court should grant the petition and reverse the order below to prevent unwarranted intrusions by overzealous bar prosecutors into the effective enforcement of the IDEA.

Respectfully submitted,

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March 30, 2006

APPENDIX A

BEFORE THE
BOARD OF COMMISSIONERS
ON THE UNAUTHORIZED PRACTICE OF LAW
THE SUPREME COURT OF OHIO

In re:	)	
CLEVELAND BAR	)	
ASSOCIATION	)	**CASE NO.: UPL 06-02**
1301 East Ninth Street,	)	
Second Level	)	(Filed February 13, 2006)
Cleveland, Ohio 44114	)	
	)	
Relator,	)	
	)	
vs.	)	
	)	
BRIAN J. WOODS, SR.	)	
584 North Hawkins Avenue	)	
Akron, Ohio 44313	)	
	)	
and	)	
	)	
SUSAN WOODS	)	
584 North Hawkins Avenue	)	
Akron, Ohio 44313	)	
	)	
Respondents.	)	

COMPLAINT AND CERTIFICATE

Relator, The Cleveland Bar Association, through its Unauthorized Practice of Law Committee, for its Complaint states as follows:

1. The Relator, Cleveland Bar Association is primarily made up of members who are Attorneys at Law practicing in Northeast Ohio.

2. The Cleveland Bar Association, through its Unauthorized Practice of Law Committee is authorized by Ohio Supreme Court Rule for the Government of the Bar VII to file a Complaint with the Board regarding the unauthorized practice of law.

3. The Respondents are not now and never have been attorneys admitted to practice, granted active status and certified to practice law in the State of Ohio or any other state pursuant to Ohio Supreme Court Rules I, II, VI, IX, XI of this Court's Rules for the Government of the Bar.

4. Brian Woods a/k/a Brian J. Woods a/k/a Brian J. Woods, Sr. and Susan Woods have appeared in federal court before Judge Polster representing Daniel A. Woods in Case No. 5:02-cv-1383; Case No. 5:02-cv-704; Case No. 5:02-cv-225; and Case No. 5:01-cv-2556.

5. Such legal representation of Daniel A. Woods in federal court is prohibited under both federal common law in Ohio, as well as, state law under the Supreme Court of Ohio Rules, Regulations, Orders, and decisions.

WHEREFORE, Relator Cleveland Bar Association respectfully requests that the Board find that Respondents have engaged in the unauthorized practice of law and request further that the Board render a finding and report to the Supreme Court of Ohio to such effect: (i) recommending that

Respondents be enjoined from practicing law in Ohio, under whatever name of label, unless and until each one has taken and passed the Ohio Bar examination and been administered the Oath of Admissions; (ii) recommending recovered by Relator of its costs and expenses herein from the Respondents; (iii) recommending that the Respondents be fined no less than $10,000; and (iv) all further relief deemed appropriate under the circumstances.

Respectfully submitted,

MICHAEL P. HARVEY CO., L.P.A.

/s

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Attorney for Relator Cleveland Bar Association Unauthorized Practice of Law Committee

APPENDIX B

THE SUPREME COURT OF OHIO

In re:	) (Filed February 21, 2006)
	)
CLEVELAND BAR ASSOCIATION	) **THE SUPREME COURT**) **OF OHIO CASE NO.:**) **2006-0357**
Relator,	)
	)
vs.	) **CLEVELAND BAR**) **ASSOCIATION CASE**
BRIAN J. WOODS, SR.	) **NO.: 050112-01**
	)
Respondent.	)

MEMORANDUM IN SUPPORT OF MOTION TO SHOW CAUSE

I. DISCUSSION

The Cleveland Bar Association's Unauthorized Practice of Law Committee was asked to investigate the alleged unauthorized practice of law by the Winkelman's, whose Sixth Circuit Appeal was recently dismissed because they chose to represent their child before that Court without being licensed attorneys or admitted to the practice of law in any state. Mr. Woods was initially a witness whose deposition was subpoenaed as part of the Winkelman UPL investigation.

But, after being twice subpoenaed and Ordered by the Commission to appear for a deposition, Mr. Woods has failed to do so.

The Relator, Cleveland Bar Association, filed a Motion to Compel with the Board of Commissioners for the Unauthorized Practice of Law who issued an Order compelling Mr. Woods' attendance if the Relator, Cleveland Bar Association provided notice to Mr. Woods both by regular and certified mail as well as copy to the Board of Commissioners. The Relator complied with this request. Five (5) days before the scheduled deposition, Mr. Woods requested a stay of the deposition, essentially claiming a "conspiracy" against him. This last minute request was denied by the Commission who served Mr. Woods personally with the Order before the deposition as well as phoned him at the only phone number everyone has for him, which was given to us by the Winkelmans, advising him that he needed to appear as scheduled on Friday, February 3, 2006 at 10:00 a.m. at the Cleveland Bar Association.

On February 3, 2006 the undersigned counsel was again in attendance for Mr. Woods' deposition but he failed to attend. Also in attendance was the Chairperson of the Unauthorized Practice of Law Committee who likewise noted Mr. Woods' failure to appear in violation of both subpoena and Commission Order.

Unfortunately, it is necessary to invoke the jurisdiction of the Ohio Supreme Court. Mr. Woods has no interest in being asked questions relating to the unauthorized practice of law committed by Mr. and Mr. Winkelman quite possibly with his assistance and guidance. In the course of that investigation, we have also discovered Mr. Woods may well have his own unauthorized practice of law issues along the same lines as the Winkelmans for which a separate Complaint is being filed.

Since the Board of Commissioners issued an Order requiring Mr. Woods to appear and he failed to appear, the

Relator, Cleveland Bar Association, has no other option but to seek application of this Court for an Order finding Mr. Woods in contempt of this Court and sanctioning him for costs and attorneys' fees for his willful disobedience of both lawful process under Rule 45 and willful disobedience of the Board of Commissioner's Orders. See *Cincinnati Bar Association v. Adjustment Service Corp.* (2000), 89 Ohio St. 3d 385.

II. CONCLUSION

WHEREFORE, for the reasons stated above, the Ohio Supreme Court is requested to find Mr. Brian J. Woods, Sr. in contempt of this Court and to Order Mr. Woods to appear before the Relator Cleveland Bar Association at a date and time convenient to the Relator for his deposition *duces tecum* not only as it relates to the Winkelmans' alleged unauthorized practice of law but also his own alleged unauthorized practice of law issues.

Furthermore, the Ohio Supreme Court is asked to fine Mr. Brian J. Woods, Sr. in an amount that this Court deems appropriate for his willful disobedience; to assess court costs and the costs of the Relator Cleveland Bar Association relating to serving Mr. Woods the subpoenas as well as any other related costs incurred by the Cleveland Bar's Unauthorized Practice of Law Committee; and finally, that Mr. Woods be Ordered to pay reasonable attorneys' fees to the Cleveland Bar Association in the amount of $500.00 as further sanction for the three failed efforts without valid excuse.

Respectfully submitted,

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/s_____

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Attorney for Relator

APPENDIX C

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVELAND BAR ASSOCIATION,	) (Filed March 16, 2006)
	)
	) **CASE NO.: 5:06-cv-00462-**
Relator,	) **PCE**
	)
vs.	) **OHIO SUPREME COURT**
	) **UPL CASE NO.: 06-02**
BRIAN J. WOODS, SR.	)
	) **JUDGE PETER C.**
and	) **ECONOMOUS**
	)
SUSAN A. WOODS	) **MAGISTRATE JUDGE**
	) **JAMES S. GALLAS**
Respondents.	)

RELATOR'S REQUEST TO REMAND AND/OR FOR ABSTENTION

The Relator, Cleveland Bar Association, filed a Complaint with the Board on the Unauthorized Practice of Law of the Ohio Supreme Court pursuant to Ohio Gov. Bar R. VII, § 5 against Brian J. Woods, Sr. and Susan Woods being assigned Case No. UPL 06-02.

Additionally, both the Relator and Respondents have respectively filed Motions to Show Cause and Objections with the Ohio Supreme Court to enforce or challenge Orders of the Board on the Unauthorized Practice of Law on the authority of

Cincinnati Bar Association v. Adjustment Service Corp. (2000), 89 Ohio St. 385 regarding Mr. Brian J. Woods' failure to appear at two (2) subpoenaed depositions and his most recent failure to appear for deposition pursuant to an Order of the Board on the Unauthorized Practice of Law.

The Relator's UPL Complaint No. 06-02 is based on the Respondents engaging in the alleged unauthorized practice of law when they appeared in the Northern District of Ohio before Judge Daniel A. Polster in four (4) cases *pro se* on behalf of their son Daniel as attorneys-in-fact. Contrary to Respondents' assertion on page two of the Notice of Removal, however, the UPL Complaint is not based upon Respondents' administrative activities that occurred prior to representing their son Daniel in federal court.

The 6th Circuit has unequivocally stated in *Jacob Winkelman v. Parma City School District* (2005), 6th Cir. Case No. 05-3886 attached to the Respondents' materials filed with this Court that a non-lawyer parent is not permitted to represent a child in federal court on IDEA claims. The 6th Circuit cited also to *Cavanaugh v. Cardinal Local School District*, 409 F.3d 753, 756-57 (6th Cir. 2005) as further support for this holding.

The Winkelmans have requested and received a stay pending their Petition for Writ of Certiorari to the U.S. Supreme Court. This stay is not directed at Relator or Respondents.

For the reasons set forth in the accompanying Memorandum in Support attached hereto, the Relator Cleveland Bar Association respectfully requests that this Court remand this matter back to the Board on the Unauthorized Practice of Law of the Ohio Supreme Court or abstain and return it to state court.

Respectfully submitted,

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